

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



November 13, 2002

Mr. Robert H. Arthur
General Counsel
Houston Police Officers' Pension System
602 Sawyer, Suite 300
Houston, Texas 77007

OR2002-6477

Dear Mr. Arthur:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172115.

The Houston Police Officers' Pension System (the "system") received a request for information relating to two partnerships in which the system is an investor. The system claims that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. The system also believes that this request for information implicates the interests of two private parties, New Enterprise Associates ("NEA") and Willis Stein & Partners, L.L.C. ("Willis Stein"). The system notified NEA and Willis Stein of the request and of their right to submit arguments to this office as to why the requested information should not be released.¹ The system also submitted the requested information. We received arguments from NEA. We also received comments from the requestor.² We have considered all of the submitted arguments and have reviewed the submitted information.

We first note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have received no correspondence from Willis Stein. Thus, Willis Stein has not demonstrated that any of the requested information that relates to the Willis

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Stein & Partners III partnership agreement constitutes proprietary information under section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

The system claims that information relating to the Willis Stein partnership agreement is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The system raises section 552.101 in conjunction with common-law privacy. The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

We note, however, that common-law privacy is designed primarily to protect human feelings and sensibilities, rather than to safeguard property, business, or other pecuniary interests. *See* Open Records Decision No. 192 at 4 (1978); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (*cited in Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). We find that a small amount of information relating to the Willis Stein partnership agreement is protected by common-law privacy. We have marked the private information that the system must withhold under section 552.101 of the Government Code.

Next, we note that NEA raises section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not the proprietary interests of private entities such as NEA. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As the system has not raised section 552.104, none of the requested information may be withheld under this exception.

Both the system and NEA also raise section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two

types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” See Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ See Open Records Decision No. 552 at 5 (1990).

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

A party that seeks to withhold commercial or financial information under section 552.110(b) must make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The system submits its arguments under section 552.110(b). The system states that the requested partnership agreements contain information relating to fee schedules, investment philosophy and decisions of the general partners, and information regarding other limited partners. The system generally asserts that release of the agreements would cause substantial competitive harm to the general partners and other limited partners. Having considered these contentions, we conclude that the system has not made the required factual or evidentiary showing that section 552.110(b) is applicable to any of the requested information.

NEA asserts that the New Enterprise Associates VIII partnership agreement is a trade secret under section 552.110(a). NEA also raises section 552.110(b) with regard to specified portions of the agreement. Having considered NEA's arguments, we find that NEA has made a *prima facie* demonstration that the New Enterprise Associates VIII partnership agreement constitutes a trade secret under section 552.110(a). We have received no arguments that rebut NEA's claim as a matter of law. Therefore, we conclude that the New Enterprises Associates VIII partnership agreement is excepted from disclosure in its entirety under section 552.110(a) of the Government Code. We have marked the information that the system must withhold. As our conclusion under section 552.110(a) is dispositive of all the information for which NEA claims exceptions to disclosure, we need not address NEA's arguments under sections 552.101 and 552.110(b).

In summary, we have marked information relating to the Willis Stein & Partners III partnership agreement that the system must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. We also have marked information relating to the New Enterprise Associates VIII partnership agreement that the system must withhold under section 552.110(a). The system must release the rest of the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

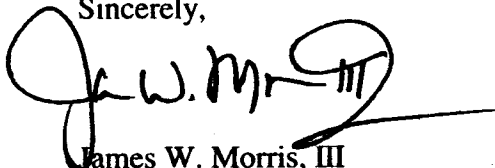
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 172115

Enc: Submitted documents

c: Mr. A.L. Mark O'Hare
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CAUSE NO. GN-204,464

WILLIS STEIN & PARTNERS
MANAGEMENT III, L.P.

V.

THE ATTORNEY GENERAL OF
TEXAS AND THE EXECUTIVE
DIRECTOR OF THE HOUSTON POLICE
OFFICERS' PENSION SYSTEM

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IN THE DISTRICT COURT OF

OF TRAVIS COUNTY, T E X A S

261ST JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the motion for entry of an agreed final judgment of Plaintiff, Willis Stein & Partners Management III, L.P. ("Willis Stein"), and Defendants, Houston Police Officers' Pension System ("HPOPS") and Gregg Abbott, the Attorney General of Texas. Plaintiff and Defendants appeared by and through their respective attorneys and announced to the court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Texas Public Information Act, TEX. GOV'T CODE, ch. 552. After considering the motion, the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue (Attachment 1 to the Motion for Entry of An Agreed Judgment) is not subject to mandatory disclosure under TEX. GOV'T CODE § 552.022(a)(1), and HPOPS must withhold the information at issue under TEX. GOV'T CODE § 552.110;

2. All costs of court are taxed against the party incurring the same; and

3. All relief not expressly granted is denied.

FILED
03 APR 27 AM 8:09
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

SIGNED this the 27th day of March, 2003.


DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

Mitchell Kuehl (by permission)
State Bar No. 24037170

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